

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

Docket No. 152,147

ORDER

ON the 5th day of May, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated March 23, 1994, came on for oral argument in Wichita, Kansas.

APPEARANCES

The claimant appeared by and through his attorney, James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, James A. Cline of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth by the Special Administrative Law Judge in his Award of March 23, 1994, is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth by the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and disability, if any?

Additional findings of the Special Administrative Law Judge, so long as they are not contrary to the opinion expressed by the Appeals Board in this Order, are found to be appropriate and are adopted by the Appeals Board as its own.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of facts and conclusions of law:

- (1) As a result of an injury on December 19, 1989, claimant has suffered a fifty percent (50%) permanent partial general body work disability.

Claimant, a truck driver with respondent, on December 19, 1989, was involved in a serious accident when his truck slid on a slick road causing the load to shift and the truck to flip onto its left side. Claimant fractured his pelvis in two spots, broke five ribs and a collarbone on the left side, suffered a collapsed lung on the left side, broke his lower right leg, tore the anterior cruciate ligament in his right kneecap, sprained a ligament on the left side of his right knee, fractured the base of his tailbone and sprained the lower joint in his back. After being hospitalized for a period of time, the claimant was released with permanent restrictions prohibiting repetitive bending, twisting, stooping, squatting, kneeling, climbing or working in awkward positions. Claimant was advised to avoid work above the horizontal with the left arm and to avoid prolonged walking and sitting. He was restricted from single lifts over forty (40) pounds and repetitive lifting over thirty-five (35) pounds, with repetitive meaning more than thirty (30) times per hour. He was prohibited from carrying over twenty-five (25) pounds at a time. These restrictions did prohibit claimant from returning to work for the respondent as a truck driver.

Claimant participated in a vocational rehabilitation program, including job search, but was unsuccessful in obtaining employment. At the time of the regular hearing, claimant had applied with one-hundred fifty-nine (159) employers but had been unsuccessful in obtaining a job. The reluctance of employers to hire him stems from his multiple limitations and restrictions.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

In a workers compensation setting, the claimant has the burden of proof to establish claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

“‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”

As a result of the injuries suffered on the date of accident, claimant is incapable of returning to work as a truck driver. His physical limitations severely restrict his ability to obtain work and, to date, claimant has been unsuccessful in finding any work that he is physically capable of doing.

K.S.A. 1992 Supp. 44-510e(a) states in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment.”

Claimant was examined and/or treated by several doctors including Dr. Philip Mills, Dr. Ernest Schlachter, and Dr. Duane Murphy. Dr. Mills examined and treated claimant primarily for the low back. In providing a functional impairment and restrictions, Dr. Mills assessed claimant a five percent (5%) impairment to the back but provided no impairment on a functional basis to the claimant's knee. He instead deferred to Dr. Murphy regarding claimant's ongoing knee symptomatology. Dr. Murphy, in treating the claimant, considered only the knee. He provided functional impairment and specific restrictions to claimant's knee but assessed nothing to the claimant's back. Only Dr. Schlachter considered both the back and the knee in assessing a functional impairment and listing specific work restrictions to the claimant. As such, the Appeals Board finds the opinion of Dr. Schlachter, in considering **all** of claimant's problems, as the more credible medical evidence.

Dr. Murphy, in assessing claimant's functional impairment, assessed a twenty-five percent (25%) functional impairment to the lower extremity which did not take into consideration any of claimant's other problems in his back. This converts to a ten percent (10%) impairment to the whole body on a functional basis. Dr. Mills assessed claimant a five percent (5%) permanent partial impairment to the body as a whole as a result of claimant's back problems but gave no functional impairment opinion regarding claimant's knee injury. Again, only Dr. Schlachter, in assessing claimant, provided an impairment rating to claimant to cover **all** of the injuries suffered by the claimant on the date of injury. In combining claimant's injuries to his body as well as the injuries suffered to claimant's lower extremities, Dr. Schlachter opined claimant had suffered a twenty-four percent (24%) permanent partial impairment of function to the body as a whole. The Appeals Board finds, based upon the entire record, that claimant's permanent partial general work disability exceeds his percentage of functional impairment and further finds that claimant is entitled to a permanent partial general work disability as a result.

Claimant was examined by Mr. Jerry Hardin on behalf of the claimant. Mr. Hardin found claimant had suffered a seventy to eighty percent (70-80%) loss of access to the open labor market based upon Dr. Schlachter's restrictions and further found claimant capable of earning approximately \$320.00 per week post-injury. Using the average weekly

wage of \$619.96 found by the Special Administrative Law Judge, a finding which was not appealed by either party, this equates to a 51.6% loss of ability to earn comparable wages.

Claimant was also examined by Mr. Monty Longacre at the request of the respondent. Mr. Longacre found, based upon Dr. Schlachter's restrictions, claimant had suffered a sixty percent (60%) loss of ability to perform work in the open labor market and, depending upon which post-injury wage was used, between a seven percent (7%) and a thirty-two percent (32%) loss of ability to earn comparable wages. When averaged, this equates to a nineteen and one-half percent (19.5%) loss of ability to earn comparable wages.

In determining the extent of permanent partial disability, both the reduction of the claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Hughes, while indicating a balance of the two factors as required, does not specifically state how this balance is to occur or what emphasis is to be placed on each of the tests. In order to arrive at a percentage, a mathematical equation or formula must necessarily be utilized. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). The balance of the claimant's ability to perform work in the open labor market and to earn comparable wages must be considered in the light of the claimant's education, training, experience, and capacity for rehabilitation. K.S.A. 1990 Supp. 44-510e(a).

The Appeals Board, in reviewing the testimony of those experts, finds no compelling reason to give credence to one expert over the other. As such, the opinions of both will be taken together with the record in assessing claimant's total loss. In averaging Mr. Longacre's opinion to that of Mr. Hardin, the Appeals Board finds claimant has suffered a sixty-five percent (65%) loss of ability to perform work in the open labor market. In further averaging claimant's loss of ability to earn a comparable wage based upon Mr. Hardin's and Mr. Longacre's opinions, the Appeals Board finds claimant has suffered a 35.6% loss of ability to earn comparable wages. When combined, this indicates a fifty percent (50%) permanent partial general body work disability as a result of the injuries suffered by claimant on December 19, 1989, while employed with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 23, 1994, shall be affirmed in part and reversed in part and that the claimant, Wendell D. Merrill, is awarded compensation against the respondent, Thompson Brothers, Inc., and its insurance carrier, Fireman's Fund Insurance Company, for a fifty percent (50%) permanent partial general body work disability as a result of the injuries of December 19, 1989.

The claimant is awarded 150 weeks temporary total disability compensation at the rate of \$271.00 per week in the sum of \$40,650.00, followed thereafter by 265 weeks of permanent partial general body work disability compensation at the rate of \$206.67 per week in the sum of \$54,767.55, making a total award of \$95,417.55.

As of November 8, 1994, there is due and owing claimant 150 weeks temporary total disability compensation at the rate of \$271.00 per week in the sum of \$40,650.00,

followed by 105.14 weeks permanent partial general body work disability at the rate of \$206.67 per week or \$21,729.28, for a sum of \$62,379.28 which is due and owing in one lump sum minus any amounts previously paid, followed thereafter by 159.86 weeks permanent partial general body work disability at the rate of \$206.67 per week or \$33,038.27 until fully paid or until further order of the Director.

Other findings of the Special Administrative Law Judge, not in contradiction to this Order, are adopted by the Appeals Board as its own opinion.

Claimant's attorney fee contract is hereby approved insofar as it is not in contravention of K.S.A. 44-536.

Fees and expenses necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Ireland & Barber Transcript of Preliminary Hearing	\$90.90
Barber & Associates Transcript of Regular Hearing	\$151.50
Deposition of Ernest R. Schlachter, M.D.	\$172.80
Deposition of Jerry D. Hardin	\$177.20
Harper & Associates Deposition of Philip R. Mills, M.D.	\$108.90
Deposition of Duane A. Murphy, M.D.	\$161.50
Don K. Smith & Associates Deposition of Monty D. Longacre	\$414.50

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
James A. Cline, Attorney for Respondent and Insurance Carrier
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director